Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONATO DALRYMPLE, *et al.*,

Petitioners,

v.

JANET RENO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a writ of certiorari should issue because the Appellate Court's ruling conflicts with relevant decisions of this Court on an important question of federal law, namely, whether a plaintiff has a heightened pleading requirement in a civil rights lawsuit when the defendant is asserting a qualified immunity defense.

2. Whether a writ of certiorari should issue to resolve a conflict among the United States courts of appeals about this important question of federal law.

LIST OF PARTIES

The following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioners:

1. Donato Dalrymple
2. Gregory Paul Allen
3. Leslie Alvarez
4. Guillermo Arce
5. Joel Beltran
6. Concepcion Maria Cabral
7. Francia de la Concepcion Cabral
8. Maria Cancio
9. Nancy Canizares
10. Arturo Castellanos
11. Blanca Nieves Chils
12. Juan Francisco Chils
13. Sandra Cobas

14. Milagros Cruz

15. Cosme Damian Diago

16. Idail Diago

17. Ramon Diago

18. Norma Dominguez

19. Eva Espinosa

20. Triburcio Estupinan

21. Lenia Fernandez

22. Jose Antonio Freijo

23. Jose I. Garcia

24. Ledia Betancourt Garcia

25. Rosa Garcia

26. Ruben Garcia

27. Carlos Alberto Gonzalez

28. Jose A. Gonzalez

29. Josefa R. Gonzalez

30. Estrelva G. Guevara

31. Pablo Hernandez

32. Martha Teresita Lara

33. Martha Lorenzo

34. Troadio Mesa

35. Mario Miranda

36. Jorge A. Morales

37. Zaida Nunez

38. Roberto Orama

39. Anna Teresa Ortega

40. Antonio Florentino Ortega

41. Miriam Palacio

42. Otoniel Ramos

43. Maria A. Riveron

44. Pedro Riveron

45. Maria E. Rodriguez

46. Michael Stafford

47. Diego Tintorero

48. Alexei Torres

49. Carman Valdes

50. Divaldo Valdes

51. Miriam Zaldivar

52. Carlos R. Zayas

Respondents:

1. Janet Reno
2. Eric Holder
3. Doris Meissner

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OPINIONS BELOW

The decision of the U.S. District Court for the Southern District of Florida (hereinafter "District Court") is reported at 164 F. Supp. 2d 1364. The decision of the U.S. Court of Appeals for the Eleventh Circuit (hereinafter "Appellate Court") is reported at 334 F.3d 991. The Appellate Court's denial of Petitioners' petition for rehearing *en banc* is unreported.

STATEMENT OF JURISDICTION

The Appellate Court reversed the District Court's ruling and dismissed Petitioners' claims against Respondents, brought under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), on June 19, 2003. The Appellate Court denied Petitioners' timely petition for rehearing *en banc* on September 16, 2003.

This petition for writ of certiorari is timely, as it is being filed within ninety (90) days of the September 16, 2003 denial of the petition for rehearing *en banc*, or by December 15, 2003.

If this petition for writ of certiorari is granted, the U.S. Supreme Court will have jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Procedural History

Plaintiffs/Petitioners initiated this action on May 22, 2000. Count I alleges that Plaintiffs' rights of freedom of expression and assembly, guaranteed by the First Amendment, were violated by Defendants' paramilitary raid. Count II alleges a violation of Plaintiffs' Fourth Amendment

rights by reason of the raid. Count III alleges a violation of Plaintiffs' Fifth Amendment rights by reason of the raid.

On October 1, 2001, the District Court dismissed Counts I, II and III against defendants Eric Holder (hereinafter "Holder") and Doris Meissner (hereinafter "Meissner") and dismissed Count III against Janet Reno (hereinafter "Reno"). In so ruling, the District Court found that a *Bivens* remedy was available to Plaintiffs against Reno, the federal official alleged to have violated Plaintiffs' First and Fourth Amendment constitutional rights, and she was not entitled to a dismissal based on qualified immunity for her actions. Defendant Reno took an interlocutory appeal of the District Court's decision to the Eleventh Circuit Court of Appeals. On June 19, 2003, a three-judge panel of the Eleventh Circuit Court of Appeals reversed the District Court, finding that Reno had qualified immunity and that a *Bivens* action was not available to remedy the alleged violation of Plaintiffs' constitutional rights.

Plaintiffs filed a timely petition for rehearing *en banc* on August 4, 2003. However, the petition was denied on September 16, 2003.

B. Statement of Facts

On November 25, 1999, Elian Gonzalez, a six-year-old boy from Cuba, was found adrift in the sea off the coast of Fort Lauderdale, Florida. Three days earlier, Elian, his mother, step-father and eight other persons had fled Cuba's communist regime in a small boat, seeking freedom and the promise of a better life in the United States. The boat capsized, and Elian's mother, step-father and six other

passengers drowned. Elian was pulled from the sea as he clung to an innertube. The U.S. Coast Guard then took him to shore. After Elian was treated for dehydration and sun exposure at Hollywood Memorial Hospital, the INS paroled him into the United States, without inspection, and released him into the custody of his great-uncle, Lazaro Gonzalez, a resident of Miami, Florida. Lazaro Gonzalez subsequently filed a petition with INS seeking political asylum for Elian. Elian also filed his own asylum petition.

On January 5, 2000, INS Commissioner Meissner determined that Elian's request for political asylum would not be considered, claiming that Elian's natural father, acting through the Cuban Foreign Ministry, purportedly sought the boy's return to Cuba. On January 7, 2000, Lazaro Gonzalez filed a petition in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida seeking temporary custody of Elian. On January 10, 2000, the Miami-Dade County Circuit Court entered a Temporary Protective Order granting Lazaro Gonzalez temporary custody pending service of process on Elian's natural father and a full hearing. On January 12, 2000, Attorney General Reno upheld Meissner's decision refusing to consider Elian's petition for asylum.

Elian proceeded to challenge the refusal to consider his asylum petition by filing a civil action in the U.S. District Court for the Southern District of Florida, *Gonzalez v. Reno, et al.,* Case No.: 00-0206-CIV-MOORE. When the District Court upheld this refusal to even consider Elian's asylum petition, Elian took an immediate appeal to the U.S. Court of Appeals for the Eleventh Circuit. During the pendency of the appeal, Reno, Meissner and various other persons cooperating

with the Cuban communist government, including Gregory Craig, one of President William Jefferson Clinton's personal lawyers, arranged for Elian's natural father to travel to the United States and take custody of Elian and to thwart the boy's attempts to obtain political asylum in the United States.

Upon his arrival in the United States on or about April 6, 2000, Elian's natural father took up residence at a location in Bethesda, Maryland, occupied and controlled by the Cuban Interests Section, the representative of Cuba's communist government in the United States. At all relevant times, Elian's natural father remained under the control of the Cuban Interests Section, which is cloaked with diplomatic immunity. On April 12, 2000, the INS directed Lazaro Gonzalez to take Elian to the Opa Locka Airport in Miami-Dade County, Florida the following day, seeking to transfer custody of Elian to his natural father. In a letter to Lazaro Gonzalez that same day, the INS admitted that it was not revoking Elian's parole into the United States, but instead was ordering only successive transfers of custody.

On April 13, 2000, the Miami-Dade County Circuit Court dismissed Lazaro Gonzalez' petition, vacating the temporary custody of Elian previously granted by that Court. The INS sent Lazaro Gonzalez another letter on April 14, 2000, again reiterating that Elian's parole was not being revoked, but rather that the INS was seeking to transfer temporary custody of Elian from Lazaro Gonzalez to Elian's natural father. On April 19, 2000, the Eleventh Circuit Court of Appeals entered an injunction, pending the appeal, explicitly stating:

(1) Plaintiff, Elian Gonzalez, is ENJOINED from departing or attempting to depart from the United States;

(2) Any and all persons acting for, on behalf of, or in concert with Plaintiff, Elian Gonzalez, are ENJOINED from aiding or assisting, or attempting to aid or assist, in the removal of Plaintiff from the United States;

(3) All officers, agents, and employees of the United States, including but not limited to officers, agents and employees of the United States Department of Justice, are ENJOINED to take such reasonable and lawful measures as necessary to prevent the removal of Plaintiff, Elian Gonzalez, from the United States.

See Gonzalez v. Reno, No. 00-11424-D, slip op. at 15-16 (11th Cir. April 19, 2000).

On April 20, 2000, Lazaro Gonzalez, through his attorneys and mediators, began good faith negotiations with Reno, Meissner and Holder to reach a mutually agreeable, peaceful transfer of temporary custody of Elian. By the end of that afternoon the parties had an outline for an agreement. Despite the negotiations, the INS secretly issued an arrest warrant for Elian on April 21, 2000. Also on that date, the INS applied for a search warrant, under seal, to enter Lazaro Gonzalez' home and search for Elian. By late afternoon on Good Friday, April 21, 2000, the negotiations had led to a workable agreement between the parties. Reno instructed that the proposal be put in writing and faxed to her by 5:00 p.m.

The Gonzalez family did so at 4:52 p.m. At 8:00 p.m. the Gonzalez family spoke with one of the mediators who informed them that Reno was considering the proposal. At 9:00 p.m. a copy of the proposal was sent to Gregory Craig, Elian's natural father's attorney, for his review. At 2:00 a.m. a mediator spoke with the Gonzalez family and told them that Reno was insisting on certain changes to the terms of the agreement, specifically where the reunion would take place. At 4:00 a.m. Reno spoke with the Gonzalez family's lawyers and said that time was running out. The Gonzalez family requested a little more time to review Reno's latest proposal.

Several months before April 21, 2000, officials had erected a barricade across West N.W. 2 Street, west of the Gonzalez family's home. At various times since Elian's arrival, hundreds, if not thousands of people, including many of the Plaintiffs, had assembled peacefully behind the barricade and in nearby yards to pray and demonstrate their support for Elian and the Gonzalez family, as well as express their belief that Elian should remain in the United States. A tent had even been erected on the street behind the barricade to provide temporary shelter for the supporters.

Shortly before 5:00 a.m., Reno ordered the commencement of a raid to seize Elian by force, knowing that: a strike force of 151 heavily-armed federal agents would be unleashed on the Gonzalez family's home and neighborhood; peacefully-assembled supporters would be sprayed with gas for having assembled and expressed their support for Elian and the Gonzalez family, and would be prevented from continuing to do so; neighbors, supporters, and passers-by would be gassed, restrained, beaten, threatened and put in immediate fear for their lives and liberty. At 5:15

a.m. while the Gonzalez family was on the telephone, on hold with a mediator who was speaking with Reno, a convoy of vehicles containing federal agents dressed in combat gear and armed with semiautomatic weapons drove up to the Gonzalez family home while other federal agents approached the house from the rear.

At the time of the raid, approximately fifty (50) supporters, including many Plaintiffs, had assembled peacefully behind the barricade, in nearby yards, and elsewhere in the neighborhood, including the house directly behind the Gonzalez family's home, to demonstrate their support for Elian and the Gonzalez family. Some supporters were talking; others were praying. Approximately eight (8) women sitting in lawn chairs, representatives of an organization known as "Mothers Against Repression", were praying the rosary in the Gonzalez' front yard. When the convoy of vehicles pulled up to the Gonzalez' home, federal agents immediately began indiscriminately spraying gas to immobilize, restrain and suppress persons who had assembled peacefully behind the barricade, as well as neighbors, passers-by, and members of the media. Federal agents sprayed gas directly at persons, including Plaintiffs, behind the barricade and throughout the neighborhood. Federal agents continued to spray gas throughout the duration of the raid. The heavily-armed federal agents shouted obscenities and threatened to shoot. They beat, kicked, punched, held at gunpoint, restrained, and otherwise threatened and assaulted neighborhood residents, passers-by and persons who had assembled peacefully outside the home, including Plaintiffs.

At 5:30 a.m. Reno called the White House and advised that the raid had gone off "without a hitch." At a subsequent press conference, Reno admitted that she ordered the raid: "I commenced [the] operation . . . I gave the go-ahead for the operation . . . ." Reno also made clear that the raid was a carefully choreographed, pre-planned event, the details of which she had fully approved. In fact, Reno admitted that the only independent authority given to the federal agents on the scene was the precise timing of the raid: "Law enforcement personnel were on the scene, were authorized to and did make the final call as to when to enter the Gonzalez home, because this was a very carefully timed law enforcement operation."

On June 7, 2000, the INS made public an "Operation Reunion After Action Report", which further confirmed that Reno personally directed the paramilitary raid, that the raid was carefully planned in advance, and that the raid was fully executed as planned. According to the report, "At 5:15 a.m. on Saturday, April 22, 2000, at the direction of the Attorney General, a law enforcement operation was conducted to effect custody of Elian Gonzalez and deliver him to his father . . . All objectives for Operation Reunion were met, with . . . no fundamental changes to the approved plan." As a result of the raid, Plaintiffs suffered substantial damages.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE APPELLATE COURT'S RULING CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW, NAMELY, WHETHER A PLAINTIFF HAS A HEIGHTENED PLEADING REQUIREMENT IN A CIVIL RIGHTS LAWSUIT WHEN THE DEFENDANT IS ASSERTING A QUALIFIED IMMUNITY DEFENSE

Rule 8(a) of the Federal Rules of Civil Procedure requires that a pleading for relief "contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." According to Rule 8(a), a plaintiff is not held to a heightened pleading standard in civil rights cases when the defendant is asserting a qualified immunity defense.

This Court held in *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998):

> In the past, we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refuse to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, or requiring pleadings of heightened specificity in cases alleging municipal liability . . . our cases demonstrate that questions regarding pleading, discovery and summary judgment are most

> frequently and most effectively resolved by the rulemaking process or the legislative process. (Citations omitted).

The *Crawford-El* ruling was rendered four months after the Eleventh Circuit decision in *GJR Investments, Inc. v. County of Escambria*, 132 F.3d 1359 (11th Cir. 1998), which is the case the three-judge appellate panel cited in its decision reversing the District Court's ruling. *GJR* held that in the Eleventh Circuit a plaintiff has a heightened pleading standard, contrary to *Crawford-El.*

Moreover, several decisions within the Eleventh Circuit have opined that a heightened pleading requirement or standard is inconsistent with this Court's ruling in *Crawford-El.* In *Shows v. Morgan*, 40 F. Supp. 2d 1345, 1357-58 (M.D. Ala. 1999), the Court held: "it is unclear whether the Eleventh Circuit § 1983 pleading standard is still constitutional. The Supreme Court has indicated that the role of the courts is not to fashion heightened requirements." In *Helton v. Hawkins*, 12 F. Supp. 2d 1276, 1280-81 (M.D. Ala. 1998), the court held:

> Admittedly, the viability of the Eleventh Circuit's heightened pleading requirement for qualified immunity claims has been significantly called into doubt by a recent Supreme Court decision that rejected a District of Columbia Circuit rule that required heightened proof of improper intent for constitutional claims.

See also Rainer v. City of Winter Haven, 170 F. Supp. 2d 1225, 1232 (M.D. Fla. 2001) (noting the potential conflict

between the Eleventh Circuit's heightened pleading standard and the Supreme Court's decision in *Crawford-El*); *Edwards v. Alabama Dep't of Corrections*, 81 F. Supp. 2d 1242, 1253 (M.D. Ala. 2000); *Scott v. Estes*, 60 F. Supp. 2d 1260, 1271 (M.D. Ala. 1999) (doubting the constitutionality of the Eleventh Circuit's heightened pleading standard in light of *Crawford-El*); *Ross v. Alabama*, 15 F. Supp. 2d 1173, 1191 n.10 (M.D. Ala. 1998).

Moreover, a recent survey of the Eleventh Circuit's civil rights rulings noted confusion about what pleading standard is to be applied in civil rights cases after *Crawford-El*:

> After reading *Marsh* [*v. Butler County*, 268 F.3d 1014 (11th Cir. 2001)] and *Kyle K.* [*v. Chapman*, 208 F.3d 940 (11th Cir. 2000)], one is left to wonder about the status of the heightened pleading standard in 1983 actions against individuals in the Eleventh Circuit. The decision in *Kyle K.* suggests at least a partial repudiation of the heightened pleading standard, but the decision in *Marsh* seems to resurrect it, albeit it covertly. As a result, it is impossible to say with any degree of certainty whether the heightened pleading standard remains viable in the Eleventh Circuit. Technically, of course, because neither *Kyle K.* nor *Marsh* overruled *GJR Investments, Inc.* or *Oladeinde* [*v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992)] (as a panel opinion, *Kyle K.* could not have overruled either case), the district courts should continue to apply the heightened pleading standard as the law of this circuit until they are directly instructed otherwise by the Eleventh Circuit sitting *en banc* or by the Supreme Court.

Elizabeth J. Norman and Jacob E. Daly, *Statutory Civil Rights*, 53 Mercer L. Rev. 1499, 1510 (2002). The survey noted further:

> The perfect opportunity to clarify the role of the heightened pleading standard, and even to overrule *GJR Investments, Inc.* and *Oladeinde*, came when the court voted to reconsider *Marsh* en banc. However, by not even mentioning the term "heightened pleading standard," the en banc majority not only failed to take advantage of that opportunity, despite being provoked by the clear misstatement of law in the panel opinion, but also created more confusion in the process.

Id. at 1509.

Under a proper reading of *Crawford-El*, the Appellate Court should have affirmed the District Court's ruling in this action. A writ of certiorari should issue to resolve the conflict between this Court's rulings in *Crawford-El,* the Eleventh Circuit's continued application of a heightened pleading standard and the Appellate Court's September 16, 2003, ruling in this important matter.

II. A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS ABOUT THIS IMPORTANT QUESTION OF FEDERAL LAW

In direct contravention to the Eleventh Circuit's ruling in this matter, the Third, Sixth, Seventh, Ninth, Tenth and D.C.

Circuits have done away with a heightened pleading requirement after the *Crawford-El* decision. The Third Circuit in *Ray v. Kertes,* 285 F.3d 287, 297 (3d Cir. 2002) reversed the district court's *sua sponte* order dismissing plaintiff's complaint noting that "[a]s the [Supreme] Court pointed out, heightened pleading standards are inconsistent with the 'liberal system of 'notice pleading' set up by the federal rules.'"(Citations omitted). The Sixth Circuit in its *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999) decision stated that "*Crawford-El* disallows any type of heightened pleading standard."

The Seventh Circuit also has disallowed a heightened pleading requirement in several rulings. In *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998) the Court acknowledged that "civil rights complaints are not held to a higher standard than complaints in other civil litigation" cases. Likewise, in *Walker v. Thompson*, 288 F.3d 1005 (7th Cir. 2002), the Court found that "[a]s the Supreme Court has recently affirmed . . . and we have held time and again, . . . there is no requirement in federal suits of pleading the facts or the elements of a claim, with the exceptions . . . listed in Rule 9."

The Court in *Gallardo v. DiCarlo*, 203 F. Supp. 2d 1160, 1164 (C.D. Cal. 2002) concluded "that the Ninth Circuit's heightened pleading standard does not survive *Crawford-El*, and therefore the court will apply a non-heightened pleading standard in determining DiCarlo's Motion to Dismiss Gallardo's FAC." The Tenth Circuit in *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) held that "the circuit courts are admonished in civil rights cases not to impose management rules which deviate from those expressed in the statute and

rules of procedure, and the district courts are encouraged to use the provisions of the Federal Rules of Civil Procedure to manage these cases. We conclude that this court's heightened pleading requirement cannot survive *Crawford-El.*" Lastly, the D.C. Circuit in *Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000), determined "that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard."

The Appellate Court's September 16, 2003 decision conflicts with the rulings of several other United States courts of appeals, namely, the Third, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits' decisions. These Circuits also had a heightened pleading standard in civil rights cases until this Court's decision in *Crawford-El.* A writ of certiorari should issue to resolve the conflict among the United States courts of appeals about this important question of federal law.

CONCLUSION

Pursuant to the Federal Rules of Civil Procedure, Plaintiffs are not held to a heightened pleading standard in civil rights cases when the defendant is asserting a qualified immunity defense. This Court has previously held that the heightened pleading requirement is contrary to the federal rules of civil procedure. The Court should take this opportunity to clarify that plaintiffs in civil rights cases do not have a heightened pleading requirement when the defendant asserts a qualified immunity defense, not only because the Appellate Court's decision conflicts with prior related decisions of this Court concerning the heightened pleading standard, but also because the courts of appeals that

have addressed the issue are divided. For these and the other compelling reasons set forth above, Plaintiffs/Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A - JUNE 19, 2003
APPELLATE COURT OPINION

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15990-HH

DONATO DALRYMPLE,
GREGORY PAUL ALLEN,
et al.,

Plaintiffs-Appellees,

vs.

JANET RENO, in her personal
capacity,

Defendant-Appellant.

_____/

On Appeal from the United States District Court
for the Southern District of Florida

334 F.3d 991; 2003 U.S. App. LEXIS 12475;
16 Fla. L. Weekly Fed. C 740

June 19, 2003, Decided
June 19, 2003, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 00-01773-CV-KMM. Judge: K. Michael Moore. *Dalrymple v. Reno*, 164 F. Supp. 2d 1364, 2001 U.S. Dist. LEXIS 15625 (S.D. Fla., 2001)

DISPOSITION: Reversed.

COUNSEL: For Reno, Janet, Appellant: Schultz, Anne R., Miami, FL. McIntosh, Scott R., Department of Justice, Washington, DC. Herwig, Barbara L., Washington, DC.

For Dalrymple, Donato, Allen, Gregory Paul, Alvarez, Leslie, Arce, Guillermo, Appellees: Klayman, Larry Elliot, Klayman & Associates, P.C., Washington, DC.

For Beltran, Joel, Appellee: Klayman, Larry Elliot, Klayman & Associates, P.C., Washington, DC. Orfanedes, Paul J., Judicial Watch, Inc., Washington, DC.

JUDGES:

Before TJOFLAT, COX and BRIGHT *, Circuit Judges.

* Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION BY: TJOFLAT

OPINION: TJOFLAT, Circuit Judge:

Like our decision in *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003), this case arises from the events surrounding

the seizure by federal agents of Elian Gonzalez ("Elian") from the home of Lazaro, Angela, and Marisleysis Gonzalez ("the Gonzalezes") on April 22, 2000. In *Gonzalez v. Reno*, we held that former Attorney General Janet Reno, former Commissioner of the Immigration and Naturalization Service ("INS") Doris Meissner, and former Deputy Attorney General Eric Holder were entitled to qualified immunity from damages claims by the Gonzalezes because the Gonzalezes failed to establish a causal connection between the supervisory actions of Reno, Meissner, and Holder and the alleged excessive force by the federal agents who forcibly removed Elian Gonzalez from the Gonzalezes' home on April 22, 2000. Now, we must decide whether former Attorney General Reno is entitled to qualified immunity from damages claims by Donato Dalrymple, who was in the Gonzalezes' house when Elian was taken, and fifty-one protestors, neighbors, and passers-by who claim they were sprayed with gas, shoved, kicked, and threatened at gunpoint by federal agents during the raid to seize Elian from the Gonzalezes' home. We conclude that, like the Gonzalezes, these plaintiffs have failed to establish a causal connection between Reno's supervisory actions and the allegedly unconstitutional acts of the federal agents on the scene.

I.

On November 25, 1999, six-year-old Elian Gonzalez, a Cuban boy, was found floating on an innertube off the coast of Fort Lauderdale, Florida. The INS paroled Elian into the United States without inspection and released him into the custody of his great-uncle, Lazaro Gonzalez. After learning that Elian's father, a Cuban citizen, had requested that his son be returned to Cuba, the INS refused to consider petitions for

Elian's asylum and sought to transfer the child's custody from his uncle to his father, who was in the United States at that time. On April 21, 2000, the INS issued an administrative arrest warrant for Elian and obtained a search warrant for the Gonzalezes' residence. At approximately 5:15 a.m. on April 22, 2000, armed federal agents arrived at the Gonzalezes' home to execute the search and arrest warrants.[1]

On July 12, 2000, the plaintiffs commenced this action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), by filing a three-count complaint for damages against Attorney General Reno, INS Commissioner Meissner, and Deputy Attorney General Holder, in their individual capacities. Unlike the Gonzalezes' complaint, this complaint did not bring suit against the federal agents on the scene. The complaint alleged the following facts regarding the events that transpired in the Gonzalezes' neighborhood during the raid to seize Elian on April 22, 2000.

Plaintiff Dalrymple, the man who rescued Elian from the sea, was asleep on a couch in the Gonzalezes' front foyer when the raid began. After being awakened by the sounds of the federal agents, Dalrymple scooped up Elian from a couch in the living room and carried him to the rear bedroom shared by Lazaro and Angela Gonzalez. Associated Press photographer Alan Diaz, Elian's five-year-old cousin Lazaro Martell, and Martell's mother also ran into the room. Dalrymple held Elian in his arms as federal agents kicked

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[1] The events leading up to the pre-dawn raid on April 22, 2000, are explained in more detail in *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003).

down the bedroom door. One federal agent yelled at Dalrymple to give him the boy while pointing a 9mm submachine gun at Dalrymple. INS Agent Betty A. Mills entered the room with a blanket and grabbed Elian. The federal agents then backed out of the room with Elian, their weapons still aimed at the occupants of the room. The agents exited the house and carried Elian to a van waiting outside.

The other plaintiffs are protestors, neighbors, and passers-by who were present in the Gonzalezes' neighborhood at the time of the raid. When the convoy of federal agents arrived, the protestors were gathered behind a barricade to the west of the Gonzalezes' residence, in neighbors' yards, and elsewhere in the neighborhood to demonstrate support for Elian and the Gonzalezes. When the federal agents arrived, they "immediately began indiscriminately spraying gas to immobilize, restrain and suppress persons who had assembled peacefully behind the barricade, as well as neighbors, passers-by, and even members of the news media assembling along N.W. 2nd Street." The federal agents sprayed them with gas repeatedly, threatened to shoot them, held them at gunpoint, struck them with battering rams, clubs, and rifle butts, kicked them, shoved them to the ground, and shouted obscenities at them. Many of the neighbor plaintiffs were exposed to gas in their homes or when they stepped outside to see what was happening. Thirty-three of the plaintiffs were attempting to move closer to the Gonzalezes' residence when they were sprayed directly in the face with gas, held at gunpoint, struck, and shoved to the ground. Many of the protestor plaintiffs remained behind the barricade when their injuries occurred. The most common physical injuries suffered by plaintiffs were eye, nose, throat and skin irritation and burning, coughing, choking and difficulty breathing.

In the complaint, forty-three plaintiffs alleged violations of their freedoms of assembly and expression under the First Amendment, twenty-five alleged violations of their rights to be free from unreasonable searches and seizures under the Fourth Amendment, and all fifty-two alleged violations of their rights to be free from excessive physical force under the Fifth Amendment. In a joint motion to dismiss dated August 15, 2000, the defendants asserted the defense of qualified immunity. In an order dated October 1, 2001, the district court granted in part and denied in part the defendants' motion. The court dismissed all claims against Meissner and Holder without prejudice because the complaint failed to allege that either Meissner or Holder supervised the attorney general or was acting in a supervisory capacity when the order to seize Elian was given. The court concluded that only Reno was alleged to have exercised supervisory authority in ordering the raid.

With respect to Reno, the district court dismissed the Fourth Amendment claims of five plaintiffs who would be unable to prove they were unlawfully seized because they alleged that they left the scene immediately after being confronted by federal agents. The district court also dismissed all of the plaintiffs' Fifth Amendment claims with prejudice because, under the alleged circumstances, "no reasonable fact finder could conclude that Reno's decision to send 151 armed agent[s] to execute the warrants deprived Plaintiffs' due process in a manner that shocks the conscience." Finally, construing the complaint's allegations broadly, the court rejected Reno's qualified immunity defense with respect to the remaining First and Fourth Amendment claims because "the law was clearly established that governmental restriction of expressive conduct violated the

First Amendment if the restriction was motivated by the speaker's message. . . . [and] a reasonable officer in Reno's position would know that the law forbade her from directing the execution of a warrant in a manner that called for unjustified force against bystanders."

Reno now appeals, contending that she is entitled to qualified immunity for her actions. We agree.

II.

We have jurisdiction to review the denial of the defense of qualified immunity on interlocutory appeal pursuant to 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817, 86 L. Ed. 2d 411 (1985). We review de novo a district court's decision to grant or deny the defense of qualified immunity on a motion to dismiss, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001).

Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)). Qualified immunity "protect[s] from suit 'all but the plainly incompetent or one who is knowingly violating the federal law.'" *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (quoting *Willingham v. Loughnan*, 261 F.3d 1178, 1187 (11th

Cir. 2001)). Questions of qualified immunity should be resolved at the earliest possible stage in the litigation. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589 (1991) (per curiam). A district court should therefore grant the defense of qualified immunity on a motion to dismiss if the complaint "fails to allege the violation of a clearly established constitutional right." *Chesser*, 248 F.3d at 1121 (quoting *Williams v. Ala. State Univ.*, 102 F.3d 1179, 1182 (11th Cir. 1997)).

To receive qualified immunity, the government official must first prove that she was acting within her discretionary authority. *Vinyard v. Wilson*[[, 311 F.3d]]1340, 1346 (11th Cir. 2002). In this case, it is clear -- and undisputed -- that Reno was acting within her discretionary authority when she ordered federal agents to seize Elian Gonzalez.

Once the government official has established that she was acting within her discretionary authority, the burden shifts to the plaintiffs to show that qualified immunity is not appropriate. *Id.* The Supreme Court has set forth a two part analysis for determining whether qualified immunity is appropriate. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). The court must first ask the threshold question whether the facts alleged, taken in the light most favorable to the plaintiffs, show that the government official's conduct violated a constitutional right. *Id.* If the complaint alleges the violation of a constitutional right, the court must determine whether that right was clearly established at the time of the violation. *Id.*

Our first step, then, is to determine whether the factual allegations in the complaint, if true, establish a constitutional

violation by former Attorney General Reno. The district court properly characterized the complaint as alleging that Reno is liable in her supervisory capacity only. Therefore, for purposes of this opinion, we will assume, without deciding, that the alleged conduct by the agents on the scene violated the plaintiffs' First and Fourth Amendment rights. *See Hartley v. Parnell*, 193 F.3d 1263, 1268-69 (11th Cir. 1999) (in section 1983 sexual abuse case, assuming, without deciding, that male teacher deprived female student of substantive due process rights, then proceeding with the analysis to determine whether school principal caused that deprivation). This leaves us with the task of deciding whether Reno's supervisory actions caused the alleged constitutional violations by the agents on the scene.

"It is well established in this circuit that supervisory officials are not liable under [*Bivens*] for the unconstitutional acts of their subordinates 'on the basis of respondeat superior or vicarious liability.'" *Id.* at 1269 (quoting *Belcher v. City of Foley*, 30 F.3d 1390, 1396 (11th Cir. 1994)). "The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous." *Braddy v. Florida Dep't of Labor & Empl. Sec.*, 133 F.3d 797, 802 (11th Cir. 1998). Supervisory liability "occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional violation." *Id.*[[at 802 (quoting *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990)); *see also Greason v. Kemp*, 891 F.2d 829, 836 (11th Cir. 1990) (explaining that a supervisor "can be held liable under [*Bivens*] when a reasonable person in the supervisor's position would have known that his conduct infringed the

constitutional rights of the plaintiff, and his conduct was causally related to the constitutional violation committed by his subordinate") (citations and footnote omitted). A causal connection can be established "when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so," *id.*[[, or when the supervisor's]]improper "custom or policy . . . resulted in deliberate indifference to constitutional rights," *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991). A causal connection can also be established by facts which support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so. *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1561 (11th Cir. 1993) (finding no supervisory liability in the absence of such an inference).

In examining the factual allegations of the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity. *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998). In such cases, the complaint must allege the relevant facts "with some specificity." *Id.* "More than mere conclusory notice pleading is required. . . . [A] complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory." *Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir. 1984); *see also Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995) (holding that complaint must "include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity"). Moreover, in reviewing a motion to dismiss, we need only accept "well-

pleaded facts" and "reasonable inferences drawn from those facts." *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992). "Unsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Marsh v. Butler County*, 268 F.3d 1014, 1036 n.16 (11th Cir. 2001). We must also keep in mind the fact that "we generally accord . . . official conduct a presumption of legitimacy." *United States Dep't of State v. Ray*, 502 U.S. 164, 179, 112 S. Ct. 541, 550, 116 L. Ed. 2d 526 (1991).

We now turn to the complaint to determine whether plaintiffs have alleged sufficient facts to establish a causal connection between Reno's supervisory actions and the alleged constitutional violations by the officers on the scene. To support their allegation of a causal connection, plaintiffs allege that "Reno . . . ordered the raid . . . despite knowing and intending that: (1) a strike force of 151 heavily-armed federal agents . . . would be unleashed on the Gonzalez family's home and neighborhood; (2) peacefully assembled supporters would be sprayed with gas for having assembled and expressed their support for Elian and the Gonzalez family, and to prevent them from continuing to do so; and (3) neighbors, supporters and passers-by would be gassed, restrained, beaten, threatened and put in immediate fear for their lives and liberty." Plaintiffs further allege that "the raid was a carefully-choreographed, pre-planned event, the details of which [Reno] had fully approved" and that "Reno admitted that the only independent authority given to the federal agents on the scene was the precise timing of the raid." Complt. P 184. Plaintiffs also rely on statements Reno made after Elian was seized in which she stated that "all objectives for Operation Reunion were met, with no significant injuries to

either federal agents or bystanders and **no fundamental changes to the approved plan**." (emphasis in original).

Plaintiffs' allegations of a causal connection between Reno's supervisory actions and the alleged constitutional violations by the agents on the scene are vague and conclusory and fail to meet the heightened pleading requirements for civil rights cases involving qualified immunity. Plaintiffs allege that Reno knew and intended that the constitutional violations by the line duty officers would occur, but they fail to allege any facts in support of this allegation. Plaintiffs fail to allege that the detailed plan for the raid included spraying peaceful protestors, neighbors, and passers-by with gas, beating them, detaining them at gunpoint, or threatening to shoot them. Plaintiffs point to the fact that Reno sent 151 armed agents into the neighborhood even though she knew protestors had assembled in the neighborhood to support Elian. It is not reasonable to infer from these facts that Reno sent this many agents in order to use excessive physical force against the plaintiffs or to infringe on their First Amendment rights. A reasonable inference drawn from these facts would be that the presence of so many protestors in the neighborhood added to the uncertainty and risk of the mission to seize Elian, thereby necessitating the use of more agents to insure the agents' safety and the mission's success. Indeed, the plaintiffs' own complaint further bears this inference out because the complaint alleges that thirty-three of the plaintiffs who were allegedly unlawfully seized were actually moving closer to the Gonzalezes' home as the raid was being executed, undoubtedly causing the agents to feel uncertainty and perhaps alarm regarding the plaintiffs' possible intentions to interfere with the agents' mission.

Plaintiffs' allegations that the raid was carefully planned, virtually no discretion was given to the agents on the scene, and the mission was executed without deviation from the plan are likewise insufficient to establish supervisory liability. It is not reasonable to draw from these facts the inference that the plan Reno ordered the officers to carry out called for the agents to use excessive force against the plaintiffs or to interfere with the plaintiffs' rights under the First Amendment. It would be reasonable, however, to draw from these facts the inference that Reno ordered the agents to carry out a carefully planned mission to lawfully execute search and arrest warrants by seizing Elian, and that Reno's statements about lack of deviation from the plan refer to the fact that the plan's objective -- seizing Elian -- was achieved.

Plaintiffs have failed to allege a constitutional violation by Reno because they have failed to allege facts that would establish a causal connection between Reno's supervisory actions and the alleged constitutional violations by the officers on the scene. Reno is therefore entitled to qualified immunity under the first part of the analysis required by *Saucier v. Katz*, 533 U.S. at 201, 121 S. Ct. at 2156. Because we find no constitutional violation by Reno, we need not address whether the constitutional rights at issue were clearly established. The district court's decision denying the defense of qualified immunity is hereby REVERSED.

SO ORDERED.

APPENDIX B - SEPTEMBER 16, 2003

APPELLATE COURT'S ORDER DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15990-HH

DONATO DALRYMPLE,
GREGORY PAUL ALLEN,
et al.,

Plaintiffs-Appellees,

vs.

JANET RENO, in her personal capacity,

Defendant-Appellant.

_____/

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: TJOFLAT, COX and BRIGHT*, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

Gerald Bard Tjoflat
UNITED STATES CIRCUIT COURT

* Honorable Myron H. Bright, United States Circuit Judge for the Eight Circuit, sitting by designation.

APPENDIX C - OCTOBER 1, 2001

DISTRICT COURT MEMORANDUM OPINION AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 00-1773-CIV-MOORE

DONATO DALRYMPLE, *et al.*,

Plaintiffs,

vs.

JANET RENO, Individually and in her personal capacity, *et al.*,

Defendants.

_____/

164 F. Supp. 2d 1364; 2001 U.S. Dist. LEXIS 15625;
14 Fla. L. Weekly Fed. D 575

October 1, 2001, Decided
October 1, 2001, Filed

COUNSEL: For DONATO DALRYMPLE, plaintiff: Larry Elliot Klayman.

For GREGORY PAUL ALLEN, LESLIE ALVAREZ, GUILLERMO ARCE, JOEL BELTRAN, CONCEPCION MARIA CABRAL, FRANCIA DE LA CONCEPCION CABRAL, NANCY CANCIO, NANCY CANIZARES, ARTURO CASTELLANOS, BLANCA NIEVES CHILS, JUAN FRANCISCO CHILS, SANDRA COBAS, MILAGROS CRUZ, COSME DAMIAN DIAGO, IDAIL DIAGO, RAMON DIAGO, NORMA DOMINGUEZ, EVA ESPINOSA, TRIBURCIO ESTUPIANAN, LENIA FERNANDEZ, JOSE ANTONIO FREIJO, JOSE I. GARCIA, LEDIA BETANCOURT GARCIA, ROSA GARCIA, RUBEN GARCIA, CARLOS ANTONIO GONZALEZ, JOSE A. GONZALEZ, JOSEFA R. GONZALEZ, ESTRELVA G. GUEVARA, PABLO HERNANDEZ, MARTHA TERESITA LARA, MARTHA LORENZO, MESA TROADIO, MARIO MIRANDA, JORGE A. MORALES, ZAIDA NUNEZ, ROBERTO ORAMA, ANNA TERESA ORTEGA, ANTONIO FLORENTINO ORTEGA, MIRIAM PALACIO, OTONIEL RAMOS, MARIA RIVERON, PEDRO RIVERON, MARIA E. RODRIGUEZ, MICHEAL STAFFORD, DIEGO TINTORERO, ALEXEI TORRES, CARMEN VALDES, DIVALDO VALDES, MIRIAM A. ZALDIVAR, CARLOS R. ZAYAS, plaintiffs: Paul J. Orfanedes, Klayman & Associates, Larry Elliot Klayman, Judicial Watch Incorporated, Washington, DC.

For JANET RENO, DORIS MEISSNER, ERIC HOLDER, defendants: Nina S. Pelletier, United States Department of Justice, Washington, DC.

For DORIS MEISSNER, ERIC HOLDER, defendants: Guy Alan Lewis, United States Attorney's Office, Miami, FL.

JUDGES: K. MICHAEL MOORE, UNITED STATES DISTRICT JUDGE.

OPINION BY: K. MICHAEL MOORE

OPINION:

ORDER

This cause is before the Court upon Defendants' Motion to Dismiss.[2] Upon consideration of the motion and opposition, the Court enters the following Order.

I. Background.

This case stems from the custody dispute over six-year old Elian Gonzalez between his father Juan Miguel, a Cuban national, and his great-uncle Lazaro Gonzalez, an American citizen.[3] Elian's Uncle Lazaro sought INS asylum on Elian's behalf, but against his father's wishes. The INS refused to consider the petition because of the father's intention to return to Cuba with Elian. When Lazaro and his family refused to relinquish physical custody over the child, INS authorities obtained an administrative warrant for his arrest and a search warrant to gain entry into the Gonzalez's home. Plaintiffs herein were outside of the Gonzalez home when the INS agents arrived to retrieve Elian: most had gathered to demonstrate their support for Elian and their disagreement

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2 DE # 19.

3 Neither party involved in the underlying custody and asylum proceedings are parties to the present action.

over the INS decision; eight of them were neighbors or passers-by.

On April 22, 2000, INS agents executed the warrant and extracted Elian from the house. The Amended Complaint alleges that shortly after 5:00 a.m. on April 22, a convoy of vehicles pulled up to the Gonzalez's home. "Agents immediately began indiscriminately spraying gas to immobilize, restrain and suppress" the crowd around the house and directly behind the barricade. The agents purportedly sprayed gas continually throughout the raid,[4] shouted obscenities, and threatened the crowd with their weapons. Thirty-three of the Plaintiffs allege that when the raid began, they tried to get closer to the Gonzalez's house. All Plaintiffs were sprayed by gas. Some Plaintiffs were physically restrained by agents, ordered to stay still, and held at gun-point. Twenty Plaintiffs retreated from the area in order to seek safety. None of the Plaintiffs were arrested or otherwise detained beyond the raid. Plaintiffs all allege that they suffered substantial injuries from the gas attack.

Plaintiff Dalrymple was inside the Gonzalez' home that morning. When agents entered the house, Dalrymple grabbed Elian and ran to a room in the back of the house. Agents entered the room by force. One agent pointed a gun at Dalrymple and instructed him to hand over the boy. Another agent took the child from Dalrymple, and the agents exited the house.

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[4] Throughout Plaintiffs' pleadings they characterize the events of April 22, 2000 as a "raid." The Court recognizes this characterization as an allegation, presumed true for purposes of this Order only.

The Defendants are Attorney General Janet Reno, Deputy Attorney General Eric Holder, and Immigration and Naturalization Service Commissioner Doris Meissner; they are being sued in their individual capacities. Plaintiffs allege that Reno orchestrated the raid "from a small, private office at the U.S. Department of Justice's headquarters in Washington, D.C., surrounded by about a dozen people, including Meissner and Holder."[5] Before ordering the raid, Reno allegedly polled these surrounding officials: "Reno reportedly pointed to each one in turn and asked for their thoughts. Everyone, including Meissner and Holder, reportedly agreed to commence the raid."[6] Plaintiffs claim that Reno ordered the raid, and Meissner and Holder knew of, agreed to, approved of and/or acquiesced in the raid, despite knowing and intending that: (1) a strike force of 151 heavily-armed federal agents, consisting of 131 INS agents and 20 U.S. Marshals, would be unleashed on the Gonzalez family's home and neighborhood; (2) peacefully assembled supporters would be sprayed with gas for having assembled and expressed their support for Elian and the Gonzalez family, and to prevent them from continuing to do so; and (3) neighbors, supporters and passers-by would be gassed, restrained, beaten, threatened and put in immediate fear for their lives and liberty.[7]

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5 Amended Complaint, P 100.

6 The other officials are not named in the Amended Complaint, nor are they parties to this action.

7 Amended Complaint, P 108.

Plaintiffs speculate that the raid "had been carefully-planned and rehearsed for nearly two weeks."[8] Plaintiffs allege that Defendants knew the raid as planned would infringe upon the constitutional rights of Plaintiffs, whose presence was actually known to Defendants: in the weeks preceding the raid, barricades had been erected across the street where "hundreds, if not thousands of persons, including many of Plaintiffs, had assembled peacefully"[9] to demonstrate and protest. Also, the INS maintained daily surveillance of the Gonzalez home.

The Amended Complaint contains three Counts: forty-three Plaintiffs allege violation of their freedoms of assembly and expression as guaranteed by the First Amendment; twenty-five Plaintiffs assert violations of their rights to be free from unreasonable seizures as guaranteed by the Fourth Amendment; and all fifty-two claim deprivation of their liberty interest of personal security provided by the Fifth Amendment's due process clause. The Amended Complaint alleges that Defendants intentionally[10] violated Plaintiffs' rights by sending 151 armed agents to execute the warrant and seize Elian. Plaintiffs claim that Defendants directed the raid

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8 Amended Complaint, P 109.

9 Amended Complaint, P 110.

10 The Amended Complaint attributes to the Defendants each and all possible levels of culpability: "maliciously, willfully, and knowingly, and with specific intent to deprive Plaintiffs of their constitutional rights, and/or with deliberate indifference to Plaintiffs' constitutional rights." Amended Complaint, P 191, 197, 204.

to be conducted in a manner so as to interfere with Plaintiffs' freedom of expression, condoning Plaintiffs' unreasonable seizure, and subjecting them to excessive force.[11] Plaintiffs attack the validity of the underlying warrant, contending that Defendants directed the warrant's issuance "to provide a false legal pretext for a paramilitary raid on the Gonzalez family's home and neighborhood, which the Defendants were jointly planning."[12]

II. Motion to Dismiss Standard.

Dismissal of the complaint for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). On a motion to dismiss, the Court must accept as true all alleged facts, and must further view all inferences from those facts in the light most favorable to the plaintiff. *See Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994). The Court need not, however, accept factual claims that are internally inconsistent, conclusory allegations, unwarranted deductions, or mere legal conclusions asserted by the plaintiff. *See Campos v. INS*, 32 F. Supp. 2d 1337, 1343 (S.D. Fla. 1998). "When, on the basis of a dispositive issue of law, no construction of the factual

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11 Counts II and III both assert allegations that the agents used excessive force against the Plaintiffs. Count II asserts claims which arose in the context of the Fourth Amendment, pursuant to a seizure; Count III asserts the due process claims of those Plaintiffs who were not seized.

12 Amended Complaint, P 82.

allegations of a complaint will support the cause of action, dismissal is appropriate." *Id.*

In their Motion to Dismiss, Defendants aver that Plaintiffs have failed to plead facts establishing a sufficient connection between the Defendants personally and any wrongful conduct. Defendants assert entitlement to qualified immunity. They argue that the Amended Complaint does not allege facts showing that Plaintiffs suffered a constitutional injury, and if they did suffer such an injury, it was not clearly established at the time. The Court addresses each argument in turn.

III. Supervisor Liability.

Plaintiffs assert claims against Defendants Reno, Holder, and Meissner personally for their participation as supervisors to the agents who conducted the raid. Supervisory liability requires allegations of a causal connection between the actions of the supervisor and the alleged constitutional deprivation. *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999). Plaintiffs aver that Defendants personally directed and ordered the raid, and that the INS agents conducted the raid exactly as ordered. Plaintiffs assert that before ordering commencement of the raid Reno polled those around her, including Defendants Holder and Meissner, for their approval.

Plaintiffs rely on *Ford v. Byrd*, 544 F.2d 194, 195 (5th Cir. 1976) for the proposition that a supervisor may be liable for his approval of constitutional violations committed by his subordinates. However, there is no allegation that either Meissner or Holder supervise the Attorney General or were acting in a supervisory capacity when the contested order was

given. Only Defendant Reno is alleged to have exercised any authority in ordering the raid.

The only conduct personally attributable to Defendants Meissner and Holder occurred in the context of the underlying custody dispute, which is irrelevant to the events giving rise to the constitutional deprivations asserted herein.[13] Plaintiffs have failed to plead facts from which Defendants Meissner and Holder could be liable for depriving Plaintiffs of their constitutional rights. Accordingly, the Amended Complaint will be dismissed without prejudice to the extent applicable against Defendants Holder and Meissner.

IV. Constitutional Allegations.

Before considering Defendant Reno's entitlement to qualified immunity, the Court must first determine whether Plaintiffs' constitutional rights were violated by her alleged conduct. The Supreme Court has instructed that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) (*citing Siegert v. Gilley*, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789

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[13] For example, INS Commissioner Meissner is charged with refusing to consider the child's asylum request; and all three Defendants are accused of cooperating with the Cuban government "to thwart the boy's attempts to obtain political asylum." Plaintiffs accuse the individual Defendants with responsibility for directing issuance of the arrest warrant.

(1991)).[14] To resolve the immunity question first would perpetuate a state of uncertainty in the law. *Id.* Accordingly, the Court must first determine whether the facts alleged show that Defendant Reno's actions deprived the Plaintiffs of any statutory or constitutional rights before considering whether those rights were clearly established on April 22, 2000. *See Wilson v. Layne,* 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999).

A. First Amendment

Plaintiffs were engaging in protected speech in a traditional public forum by demonstrating in front of the Gonzalez's house the morning of the raid. *Perry Educ. Ass'n v. Perry Local Educs. Ass'n*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). The First Amendment prohibits the government from censoring all communicative activity in a public forum, *see id.*; nonetheless, the state may regulate the time, place, and manner of expression, provided that such regulation is content-neutral, supported by a substantial government interest, and leaves open ample alternative channels for communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986); *Crowder v. Housing Auth. of Atlanta*, 990 F.2d 586, 590 (11th Cir. 1993).

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[14] Justices Breyer and Stevens expressed doubt that such inquiry is required in all cases, particularly those cases in which the parties have not adequately presented the constitutional issues. *See Lewis*, 523 U.S. at 858 (maintaining that it is the normal procedure for a court to decide a case on the grounds apparently offering the most direct and appropriate resolution).

Forty-three Plaintiffs allege that they were targeted for exercising their First Amendment rights. They were assembled behind the barricade to pray and to demonstrate their support for Elian and the Gonzalez family, and to express their view that Elian should be allowed to remain in the United States.[15] Plaintiffs allege that immediately upon their arrival at the scene, agents "began indiscriminately spraying gas to immobilize, restrain, and suppress persons who had assembled peacefully behind the barricade" among others, such as neighbors and members of the media.[16] Defendants urge the Court to reject Plaintiffs' assertion that they were treated any differently from other groups and subjected to adverse action on the basis of their views. Defendants argue that Plaintiffs' allegations belie their theory that they were targeted on account of their views, because they acknowledge that the agents went beyond the group collected behind the barricade and randomly doused the neighborhood with gas.[17] However, Plaintiffs have not plead themselves out by alleging that the agents were over-inclusive; indeed, it is entirely consistent with Plaintiffs' other accusations. Plaintiffs contend that the agents simply assumed that everyone in sight was a supporter of the Gonzalez family, protesting the INS decision.[18]

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15 Plaintiffs' Memorandum of Opposition, at 59.

16 *Id.* at 58.

17 *See* Defendants' Motion to Dismiss, at 24.

18 Nor does the allegation that the agents restricted eight nonparticipant bystanders bolster Plaintiffs' contention that the restriction was greater than necessary. *Washington*

Plaintiffs accuse Defendant Reno of ordering the interruption of their demonstration because of the content of their expression. Such an allegation will defeat Defendants' Motion to Dismiss on this Count. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); *Blackston v. State of Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (refusing to dismiss allegation that the state directed restriction against plaintiffs because they expressed grievances against the state). *Cf. Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998). Defendant's assertion that the raid was a permissible time, place and manner restriction relies on facts not contained in the Amended Complaint and accordingly is beyond the scope of the Court's consideration on a motion to dismiss.

Excessive Force

Plaintiffs' allegations of excessive force contained in both Counts II and III arise from Reno's decision to "unleash shock troops" in the Little Havana neighborhood. Plaintiffs aver that the raid as ordered could not have been conducted without interfering with Plaintiffs' rights. Accordingly, in both Counts, Plaintiffs contend that the relevant quantum of force, which they allege was clearly excessive, is the potential inherent in 151 armed officers. This argument ignores

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Mobilization Committee v. Cullinane, 184 U.S. App. D.C. 215, 566 F.2d 107, 120 (D.C. Cir. 1977) (rejecting district court's reliance on the arrest of nonparticipants in finding that police action impermissibly restricted demonstrator's First Amendment rights; police may control the demonstration and are not expected to single out individuals).

Plaintiffs' burden to demonstrate that the force actually applied was excessive under the circumstances. Defendant will not be liable for creating a dangerous situation unless Plaintiffs allege that the danger was realized, and that they suffered a constitutional injury therefrom. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986); *see also Robinson v. City of St. Charles, Missouri*, 972 F.2d 974, 977 (8th Cir. 1992) (rejecting claim against City where plaintiffs failed to evidence violation of their constitutional rights by the individual officers). Plaintiffs must plead facts showing that their rights were actually suspended; it is insufficient for Plaintiffs to allege the Defendants *intended* to cause them harm. *See, e.g., Heller*, 475 U.S. at 799 ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the [Defendant] might have *authorized* the use of constitutionally excessive force is quite beside the point.").

Plaintiffs' allegations of excessive force are subject to two different analyses: those Plaintiffs who were seized are entitled to the protection afforded by the Fourth Amendment, and their claims are accordingly governed by the "objectively reasonable" standard. *Graham v. Connor*, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) ("*All* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach"). The remaining Plaintiffs are limited to the protection of the Fifth Amendment and must allege that Defendant engaged in conscience-shocking conduct that deprived Plaintiffs of due process of law. *Id.*

1) Count II: Fourth Amendment

The Fourth Amendment Plaintiffs' claims are contained in the following allegations:

> Defendants, acting under color of federal authority, personally directed and authorized the paramilitary raid on the Gonzalez' home and neighborhood, and/or had actual knowledge of and acquiesced in the raid, in a manner that imposed substantial and complete restrictions on Plaintiffs' liberty of movement and otherwise resulted in Plaintiffs being restrained by use of physical force and show of authority, without probable cause or other legal justification.
>
> These actions by federal agents, under the personal direction of Defendants, and/or with the knowledge and acquiescence of Defendants, directly and foreseeably resulted in the unlawful and unreasonable seizure of Plaintiffs' persons, among other violations of the Fourth Amendment.[19]

Plaintiffs seeking vindication of their Fourth Amendment rights must allege facts showing that they were seized, and that such seizure was unlawful. Plaintiffs rely primarily on their contention that the warrants, which were obtained for Elian's arrest and authorized entry into the Gonzalez's home, were invalid; as such, their warrantless seizure was unreasonable, and the use of any force presumptively excessive. However, Plaintiffs' assertion that the warrant was invalid has been resolved by the Court's Order of June 6,

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19 Amended Complaint, PP 195-96.

2001 in Case No. 00-3621-CIV-HIGHSMITH, wherein Judge Highsmith found that the warrant was sufficiently supported and properly issued. The Court adopts in full Judge Highsmith's findings, negating the necessity for further consideration of the legality of the warrant.

Twenty-five Plaintiffs contend that they were illegally seized, some by the actual application of force, others under the threat of force: agents purportedly struck Plaintiffs with their weapons, held them at gun point, grabbed and pulled them away from the Gonzalez home, pushed them back behind the barricade and sprayed them with gas. All but two of these Plaintiffs advanced towards the Gonzalez home when the agents arrived. At least two actively attempted to interfere with the agents as they entered the house.

A "seizure" implicating the Fourth Amendment's protection occurs when a government actor restrains the liberty of a citizen "by means of physical force or show of authority." *Terry v. Ohio*, 392 U.S. 1, 20 n.16, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Initially, the Court must reject the claims of those Plaintiffs who were not seized: five Plaintiffs allege that they left the scene after being confronted by agents.[20] These Plaintiffs could not prove any set of facts, consistent with their allegations, showing that their liberty was actually restrained; accordingly, their claims will be dismissed.

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[20] Eva Espinosa, P 148; Triburcio Estupinan, P 149; Jose I. Garcia, P 152; Ledia Betancourt Garcia, P 153; Rosa Garcia, P 154.

Defendant relies on *California v. Hodari D.*, 499 U.S. 621, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991), and asserts that none of the Plaintiffs were seized within the meaning of the Fourth Amendment. Plaintiffs have distinguished their claims from *Hodari* by alleging that each of them was subjected to some application of force and that they yielded to that force. A reasonable person would not believe that they were free to leave while being held at gun point, or after being ordered to lie still by a law enforcement officer; the Amended Complaint alleges that the Fourth Amendment Plaintiffs were subjected to such a show of force.[21] The allegations contained in Count II, as to the remaining Plaintiffs, sufficiently plead that they were seized.

Seizure alone does not entitle Plaintiffs to relief; they must further allege facts showing that the seizure was unreasonable. *See Brower v. County of Inyo*, 489 U.S. 593, 599, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989). Plaintiffs contend that Reno ordered and intended that Plaintiffs be subjected to the alleged seizure. Alternatively, Plaintiffs assert that Reno was deliberately indifferent to Plaintiffs' rights when she made the decision to send 151 armed troops into a peaceful neighborhood. The raid as it was ordered could not, Plaintiffs suggest, have been executed without

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[21] Plaintiffs will ultimately bear the burden of proving not only that they submitted to the agents' authority, but that the agents intended to physically restrain the Plaintiffs. *See Brower v. County of Inyo*, 489 U.S. 593, 598, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989); *Hicks v. Leake*, 821 F. Supp. 419, 421 (W.D. Va. 1992) ("specific intent to restrain must be alleged and proven in order to establish a claim for an excessive force violation of the Fourth Amendment").

interfering with Plaintiffs' rights, and Reno incurred liability to them upon issuing the order. Plaintiffs' theories differ only in the state of mind they attribute to Reno's actions. Under either theory, Plaintiffs allege that Reno's decision to cause their seizure was made in the absence of any justification.

Whether the force used to effectuate a particular seizure is excessive requires a comparison of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) (internal quotation marks omitted). Where, as in the present case, Plaintiffs were allegedly exercising their First Amendment rights of freedom of expression and of assembly, "the requirements of the Fourth Amendment must be applied with scrupulous exactitude." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978).

Excessive force claims are evaluated for objective reasonableness based on the information the officers had when the contested conduct occurred. *See Graham*, 490 U.S. at 396. Plaintiffs allege that the raid was conducted exactly as planned and intended; the relevant inquiry then would be whether the force used was excessive in light of the information known to Reno when she directed commencement of the raid. Plaintiffs contend that Reno choreographed the raid from a detached site and determined the amount of force to be used before the agents were even deployed. According to Plaintiffs, at the time that the decision was made, Defendant allegedly lacked knowledge of any facts that would justify Plaintiffs' seizure: Reno purportedly knew only that Plaintiffs were present, and that they were

demonstrating their disagreement with the government's actions. Accordingly, Plaintiffs argue, it is not relevant that they moved closer to the house.

Defendant avers that the reasonableness of the agents' conduct is evidenced by the number of persons they confronted on the scene and the fact that half of those present tried to get closer or directly interfere. Likewise, Plaintiffs aver that the excessiveness of the force employed may be determined from the following facts: the number of armed agents assigned to conduct the raid; the extent of the injuries sustained; and the absence of any need to use force to suppress the crowd. The Constitutionality of the officers' conduct must be determined upon examination of the tenor of the demonstration as a whole. *Washington Mobilization Committee v. Cullinane*, 184 U.S. App. D.C. 215, 566 F.2d 107, 120 (D.C. Cir. 1977). Plaintiffs generally aver that they were peacefully assembled. The single fact that some tried to get closer does not demonstrate a threat sufficient for the Court to decide that the force applied was reasonable as a matter of law.

Finally, Defendant argues that Plaintiffs' claims are foreclosed by the holding in *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000), that a "minimal amount of force and injury . . . will not defeat an officer's qualified immunity in an excessive force case." *Id.* at 1258. *Nolin* was decided on summary judgment, and the record there reflected an important fact not plead in the Amended Complaint: none of plaintiff's injuries necessitated medical treatment. The Court cannot determine as a matter of law that the amount of force was *de minimis* without a factual record establishing the degree of Plaintiffs' injuries. Allowing every permissible

inference in Plaintiffs' favor, as the Court must on a motion to dismiss, Plaintiffs have sufficiently plead the issue of whether the amount of force was excessive.

2) Count III: Fifth Amendment

All fifty-two Plaintiffs assert claims for violation of their substantive due process rights to a liberty interest to be free from excessive force as guaranteed by the Fifth Amendment. Having determined that twenty of these Plaintiffs have properly alleged that they were seized, their claims of excessive force are limited to analysis under the Fourth Amendment.[22] Accordingly, Count III of the Amended Complaint will be dismissed as to these twenty Plaintiffs.

The substantive due process guarantee protects against government power arbitrarily and oppressively exercised. *See Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). In cases alleging abuses of executive power, only the most egregious conduct can be said to be "arbitrary in the constitutional sense." *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). Plaintiffs acknowledge that official conduct is actionable under the Fifth Amendment only if it shocks the conscience, whether such conduct was intended to cause

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[22] As noted above, the *Graham* Court held that claims of excessive force arising in the context of arrests or seizures are properly analyzed under the Fourth Amendment's "objective reasonableness standard," not the Fifth Amendment's substantive due process standard. *See Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151, 2155 (2001).

injury, or just deliberately indifferent to the constitutional rights of others.[23]

The standard of culpability by which the Court will test Reno's conduct depends on the circumstances. An official may be liable for establishing a policy or plan that results in deliberate indifference to constitutional rights, *see Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991); or for failing to properly train a subordinate who causes harm by unconstitutional conduct, for which he would be individually liable. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 n.10, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). A defendant who had sufficient time to prevent the alleged excessive use of force, conversely, can be held liable for mere deliberate indifference to plaintiff's rights. Defendant will be held to a standard of deliberate indifference only if she actually had the opportunity to consider what impact her decision would have on the Plaintiffs. *Id.* at 851.

Plaintiffs advance the deliberate indifference standard of culpability, accusing Reno of carefully planning the raid and intending that Plaintiffs suffer deprivations of their constitutional rights. Plaintiffs' theory is that Defendant is liable for her "decision to unleash 151 heavily-armed, machine gun and gas wielding shock troops to transfer custody of a six-year old boy." Plaintiffs advance the following allegations which they contend demonstrate the conscience-shocking nature of Defendant's conduct: that Defendant acted under political pressure to resolve the

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[23] Plaintiffs' Opposition Memorandum, at 46 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998).

situation quickly, rather than with regard to Plaintiffs' rights; that she obtained an invalid warrant on which to justify the raid; that she deliberately planned the raid in advance; and that she had knowledge of the Plaintiffs' presence when she issued the order to commence the raid. Though Reno denies having given any instruction as to what force, if any, should be used at the scene and contends that the determination to use force was made by agents at the scene, Plaintiffs' allege that the raid was specifically choreographed by Reno. For the purpose of deciding this motion, the Court must accept Plaintiffs' allegation that the raid was conducted exactly as it was planned by Defendant.

Plaintiffs acknowledged that the purpose of the governmental action was to retrieve Elian, though they dispute the legality of the warrants authorizing the arrest. The Amended Complaint describes the scene of the arrest as ~~having~~ hosted "hundreds, sometimes thousands" of demonstrators, gathered both to support the Gonzalez family and to protest the government's decision to return Elian to his Cuban father. Under the circumstances described by Plaintiffs, the alleged assaults were neither particularly violent, nor was the number of law enforcement officers disproportionate to the objective need to maintain order, nor were the injuries allegedly sustained by the Plaintiffs significant.[24] Even if the force applied was unnecessary under

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[24] Many of Plaintiffs suffered from eye, nose and throat irritation, skin rashes, headaches, and nausea from the gas; others experienced anxiety and sleeplessness; some sustained bruises and one Plaintiff sprained a wrist. The extent of Plaintiffs' alleged injuries are relevant here for different reasons than in the Fourth Amendment discussion above,

the circumstances, no reasonable fact finder could conclude that Reno's decision to send 151 armed agents to execute the warrants deprived Plaintiffs' due process in a manner that shocks the conscience.[25]

Plaintiffs contend that the Court should not reach any determination at this stage of pleading as to the facts which might justify Defendants' use of force. Plaintiffs assert that any facts supporting Defendants' justification of force will come out through discovery, at which time Plaintiffs will have the opportunity to challenge their evidence. However, in reaching this determination, the Court has relied entirely upon the facts advanced in Plaintiffs' pleadings without regard to the defenses or justifications asserted by Defendants. Additionally, Plaintiffs have not proffered any case law supporting their contention that the conduct alleged violates the due process clause, under any standard of intent. Nor is the Court aware of any such holding; at the very least, the absence of case law clearly establishing the illegality of such conduct would entitle Defendant to qualified immunity.

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addressing Defendant's contention that the use of force was *de minimis*. It is not inconsistent for the Court to conclude as it does that Plaintiffs' injuries were relatively minor without finding that they were the result of a minimal use of force.

[25] A comparison of the facts alleged to the case law further compels the conclusion that Plaintiffs could not prevail on any facts consistent with those pled. *See, e.g., Lee v. Williams*, 138 F. Supp. 2d 748 (E.D. Va. 2001) (denying due process claim of hostage shot in police stand-off with robbery suspects).

V. Qualified Immunity.

An officer will not be entitled to qualified immunity if, for example, "various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151, 2157 (2001). Application of qualified immunity is the rule, not the exception. *See Lassiter v. Alabama A&M University Brd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994). It is incumbent on Plaintiffs to show that the extraordinary circumstances of their case bring it into the exception. *See Samarco v. Neumann,* 44 F. Supp. 2d 1276, 1296 (S.D. Fla. 1999).

The law was clearly established that governmental restriction of expressive conduct violated the First Amendment if the restriction was motivated by the speaker's message. Likewise, a reasonable officer in Reno's position would know that the law forbade her from directing the execution of a warrant in a manner that called for unjustified force against bystanders. *See, e.g., Sims v. Glover*, 84 F. Supp. 2d 1273, 1289 (M.D. Ala. 1999) (denying qualified immunity on officer's motion to dismiss, where complaint alleged that seizure and application of force was wholly unjustified). Defendant's argument relating to her entitlement to qualified immunity adopts a construction of the alleged wrongful conduct, and of the corresponding right to be free from such wrongful conduct, which relies on circumstances not established in the pleadings. The Court must broadly construe Plaintiffs' allegations at this stage and may not adopt an interpretation of the facts that narrows Plaintiffs' claims. At this stage, the Defendant's assertion of qualified immunity

will be denied without prejudice to reassert the defense on summary judgment, upon development of an evidentiary record.

CONCLUSION

It is hereby ORDERED and ADJUDGED that Defendants' Motion to Dismiss is GRANTED in part and DENIED in part, as follows:

1) The Amended Complaint is DISMISSED, without prejudice, to the extent applicable to Defendants Doris Meissner, and Eric Holder. Plaintiffs may amend their claims, if at all, within twenty days of the date of this Order.

2) Count II is dismissed as to Plaintiffs Eva Espinosa, Triburcio Estupinan, Jose I. Garcia, Ledia Betancourt Garcia, and Rosa Garcia.

3) Count III of the Amended Complaint is DISMISSED with prejudice.

4) Defendants' Motion is DENIED in all other respects.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of October, 2001.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 11 2004
OFFICE OF THE CLERK

(2)

No. 03-841

In the Supreme Court of the United States

DONATO DALRYMPLE, ET AL., PETITIONERS

v.

JANET RENO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a complaint filed pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that seeks damages from a high-level government official can be subject to a heightened pleading requirement where the claims turn upon the actions taken by the official in a supervisory capacity.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 334 F.3d 991. The opinion of the district court (Pet. App. 16-39) is reported at 164 F. Supp. 2d 1364.

JURISDICTION

The court of appeals entered its judgment on June 19, 2003. A petition for rehearing was denied on September 16, 2003 (Pet. App. 14-15). The petition for a writ of certiorari was filed on December 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. In November 1999, six-year-old Elian Gonzalez was found floating on an inner tube off the coast of Florida. Pet App. 3. The Immigration and Naturalization Service (INS) temporarily paroled him into the United States and released him into the custody of his great uncle, Lazaro Gonzalez, who resided in Miami. *Ibid.* Lazaro Gonzalez filed petitions for political asylum on behalf of Elian, *id.* at 3-4, but, because Elian's father requested that his son be returned to Cuba, the then-Commissioner of the INS, Doris Meissner, declined to consider the asylum petitions and the then-Attorney General Janet Reno sustained that decision, see *ibid.* The District Court for the Southern District of Florida upheld the decision, *Gonzalez* v. *Reno*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000), and Lazaro Gonzalez appealed.

While the appeal was pending, Elian's father arrived in the United States. The INS then sought to transfer custody of Elian from Lazaro Gonzalez to the father. Pet. App. 4. When Lazaro Gonzalez failed to comply with requests to transfer custody, the INS informed him that Elian's parole into his custody had been revoked. C.A. App. Tab 19-App, Exh. E. When Lazaro Gonzalez persisted in his refusal to transfer the child, the INS issued an administrative warrant for Elian's arrest and obtained a search warrant to enter the Gonzalez home to search for Elian. See Pet. App. 4; 8 U.S.C. 1226(a). The affidavit submitted in support of the search warrant explained that the search might need to be executed during the nighttime because "[t]he numbers of individuals outside the home dwindles during the night time hours," and thus a search at night would encounter "the least amount of

resistance from any crowd gathered outside the home, [would] ensure the safety of Elian Gonzalez, and [would] protect the officers executing the warrant." C.A. App. Tab 19-App., Affid. at 8.

Federal agents executed the search and administrative arrest warrants in the early morning of April 22, 2000, removing Elian from the home and reuniting him with his father. Pet. App. 4-5. Subsequently, the court of appeals sustained Attorney General Reno's decision not to consider the asylum petitions filed by Lazaro Gonzalez, and this Court denied an application for stay and petition for a writ of certiorari. *Gonzalez* v. *Reno*, 212 F.3d 1338 (11th Cir.), cert. denied, 530 U.S. 1270 (2000). Elian then returned to Cuba with his father.

2. Petitioners are 52 individuals who were near or, in one instance, inside the Gonzalez home at the time the arrest and search warrants were executed. When the agents arrived, at least half of the petitioners tried to "move closer to the Gonzalez family's home," C.A. App. Tab 11 (Amended Compl.) ¶¶ 132-138, 150-157, 160-163, 165-166, 173, 180-181, and two petitioners took positions in front of the home and attempted to block the officers from entering, *id.* ¶¶ 135, 175. Petitioners allege that the agents who carried out the operation used excessive force against them by spraying teargas, threatening them with guns, or pushing them. See Pet. App. 4-5.

Petitioners filed suit against former Attorney General Janet Reno and two other senior officials, then-Deputy Attorney General Eric Holder and then-INS Commissioner Doris Meissner, seeking more than $100 million in damages from them in their personal capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The

complaint alleged that Attorney General Reno and the other two defendants "personally directed" the agents and caused the warrants to be executed in an unconstitutional "manner," in violation of the petitioners' First, Fourth, and Fifth Amendment rights. C.A. App. Tab 11 (Amended Compl.) ¶¶ 189-190, 195-196, 201, 203. Petitioners did not sue any of the agents who executed the warrants or were at the scene.

The defendants moved to dismiss the complaint on the ground that the claims were barred by qualified immunity because the actions of the law enforcement agents, and *a fortiori* the defendants' own actions, did not violate petitioners' clearly established constitutional rights. The district court dismissed all the claims against defendants Holder and Meissner, but dismissed only the Fifth Amendment claim against Attorney General Reno. Pet. App. 23-24, 34-37. The court denied the motion to dismiss the First and Fourth Amendment claims against the former Attorney General on the grounds that the complaint stated valid First and Fourth Amendment claims and that the allegations were sufficient to subject Attorney General Reno to supervisory liability for the actions of the agents who executed the warrants. *Id.* at 23-34.

3. Attorney General Reno took an interlocutory appeal, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985), and the court of appeals reversed. Pet. App. 1-13. The court held that Attorney General Reno could be held liable only if her "supervisory actions caused the alleged constitutional violations by the agents on the scene." *Id.* at 9; see also *id.* at 10 (causal connection can be established if a supervisor "directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them"). Following unchallenged circuit precedent

decided before this Court's decision in *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), the court explained that, in cases involving assertions of qualified immunity, "the complaint must allege the relevant facts with 'some specificity,'" and that "[m]ore than mere conclusory notice pleading is required." Pet. App. 10. Under what the court termed its "heightened pleading" standard, "a complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory." *Ibid.*

Applying that standard, the court of appeals concluded that petitioners "have failed to allege facts that would establish a causal connection between Reno's supervisory actions and the alleged constitutional violations by the officers on the scene." Pet. App. 13. The court observed that the complaint's allegations regarding the former Attorney General's responsibility for the agent's actions were "vague and conclusory," and further held that simply asserting that the operation was "carefully choreographed [and] pre-planned" could not reasonably support an inference that the former Attorney General directed the agents to use unlawful force. *Id.* at 12-13.

Petitioners filed a petition for rehearing in which they challenged, for the first time, the court of appeals' established law requiring heightened pleading in qualified immunity cases as inconsistent with *Crawford-El*. The court of appeals denied the petition for rehearing. Pet. App. 14.

ARGUMENT

In *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), this Court held that, when a plaintiff brings a constitutional tort claim that is predicated on unconstitutional motivation, the plaintiff need not adduce "clear and convincing evidence" of the defendant's motive in order to

survive a motion for summary judgment. *Id.* at 578. Petitioners seek this Court's review of the court of appeals' pleading requirement on the ground that it conflicts with this Court's decision concerning a heightened evidentiary burden of proof in *Crawford-El* (Pet. 10-13), and with the decisions of other circuits (Pet. 13-15). Review in this case would be inappropriate, however, because petitioners failed properly to preserve their challenge to the pleading requirement, because the unique factual context in which this case arises makes it an inapt vehicle for resolving the question presented, and because the decision below is correct.

1. Although petitioners now argue (Pet. 10-13) that the court of appeals' longstanding pleading requirement conflicts with this Court's decision in *Crawford-El*, *supra*, petitioners did not properly present or preserve that argument below. Indeed, the arguments presented by petitioners to the panel bore no resemblance to the argument for which petitioners seek this Court's review. See Pet. C.A. Br. 13-49. Petitioners simply did not contest under *Crawford-El*, or on any other basis, the court's continuing application of established circuit precedent imposing heightened pleading requirements in lawsuits against government officials sued in their personal capacities. See, *e.g.*, *GJR Investments, Inc.* v. *County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998). In fact, petitioners' appellate brief did not even cite *Crawford-El*, much less suggest that it required the Eleventh Circuit to depart from extant circuit precedent.[1] As a result, the appropriateness of the

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[1] See, *e.g.*, *Davis* v. *Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) ("To the extent of any inconsistency between our [prior opinions'] pronouncements and the Supreme Court's supervening ones, of course, we are required to heed those of the Supreme

pleading standard applied by the court of appeals, in light of *Crawford-El*, was never placed at issue before the panel or addressed by the decision below. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see also *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994).

Petitioners' omission is particularly glaring because the government expressly argued that the circuit's pleading requirement is consistent with and, indeed, invited by the Court's decision in *Crawford-El*. See Gov't C.A. Opening Br. 22, 32-34; Gov't C.A. Reply Br. 9-10. Petitioners thus were fully apprised of *Crawford-El*'s relevance to the appeal. Petitioners' failure to present to the court of appeals the argument they now raise before this Court thus cannot readily be attributed to anything other than a tactical litigation judgment. The certiorari process, however, is not designed to relieve disappointed litigants of the consequences of strategies employed below.[2]

2. Petitioners assert (Pet. 13-15) that this Court's review is necessary to resolve a circuit conflict on the

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Court."); *Lufkin* v. *McCallum*, 956 F.2d 1104, 1107 (11th Cir.) ("A panel of this Court may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to an intervening decision of the Supreme Court"), cert. denied, 506 U.S. 917 (1992).

[2] While petitioners later raised the issue in their rehearing petition, that tardy assertion was procedurally barred because the Eleventh Circuit, like other courts of appeals, "do[es] not consider issues or arguments raised for the first time on petition for rehearing." *United States* v. *Martinez*, 96 F.3d 473, 475 (11th Cir. 1996), cert. denied, 519 U.S. 1133 (1997).

question whether, consistent with *Crawford-El*, courts may impose what has been characterized as a heightened pleading requirement in lawsuits brought against government officials in their personal capacities under *Bivens*. While a circuit conflict exists on the question, it is not well evidenced by the cases that petitioners cite. Compare *Galbraith* v. *County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002); *Goad* v. *Mitchell*, 297 F.3d 497, 502-503 (6th Cir. 2002); *Higgs* v. *Carver*, 286 F.3d 437, 439 (7th Cir. 2002); and *Currier* v. *Doran*, 242 F.3d 905, 915-916 (10th Cir.), cert. denied, 534 U.S. 1019 (2001) (all: rejecting heightened pleading requirements), with *Judge* v. *City of Lowell*, 160 F.3d 67, 72-75 (1st Cir. 1998) (imposing heightened pleading requirement in qualified immunity cases as consistent with *Crawford-El*); cf. *Trulock* v. *Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) ("Although there is no heightened pleading standard in qualified immunity cases, a district court has the discretion to ask a plaintiff to "put forward specific, non-conclusory factual allegations that establish improper motive.") (citing *Crawford-El*), cert. denied, 537 U.S. 1045 (2002).[3]

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[3] Five of the six cases cited by petitioners (Pet. 13-15) do not evidence a circuit conflict. In three of the cited cases, the language discussing a heightened pleading requirement was dicta. See *Thaddeus-X* v. *Blatter*, 175 F.3d 378, 399-400 (6th Cir. 1999) (en banc) (an evenly divided en banc court, in a multiplicity of opinions, ultimately concluded that the plaintiffs' evidence regarding retaliatory motive precluded summary judgment); *Nance* v. *Vieregge*, 147 F.3d 589, 590-591 (7th Cir.) (complaint properly dismissed for failure to state a claim), cert. denied, 525 U.S. 973 (1998); *Harbury* v. *Deutch*, 233 F.3d 596, 610-611 (D.C. Cir. 2000) (defendant's motive is germane to constitutional claim for denial of access to courts), rev'd on other grounds, 536 U.S. 403 (2002). Two of the other cases cited involve totally different pleading rules applied in cases not involving qualified immunity. See *Ray* v. *Kertes*, 285

This is a particularly inappropriate case in which to address that circuit conflict, however. First, notably absent from the list of conflicting circuits is the court of appeals below. The Eleventh Circuit simply has not yet definitively joined the debate over the effect of *Crawford-El* on heightened pleading requirements, because petitioners failed to argue the issue to the panel. How that circuit will resolve the question of whether heightened pleading requirements are consistent or inconsistent with *Crawford-El* when the matter is properly presented to it thus remains an open question. The failure to raise the issue, moreover, clearly deprived the Eleventh Circuit of an opportunity to weigh in on the issue that has divided the circuits or to explain why this case may involve special considerations justifying heightened pleading either as a matter of procedural or substantive law.

The latter possibility is strongly implicated here and, indeed, the nature of the constitutional injury asserted in this case provides an atypical context in which to consider the heightened-pleading question. Petitioners have not sued the law enforcement agents who executed the search and arrest warrants in a manner that petitioners allege was unconstitutional. They instead have sued only former Attorney General Janet Reno.[4] This Court has long acknowledged the significant

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F.3d 287, 297 (3d Cir. 2002) (exhaustion requirement of the Prison Litigation Reform Act of 1996 is not subject to heightened pleading requirement); *Walker* v. *Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (civil rights plaintiff need not allege overt acts in furtherance of conspiracy) (dicta).

[4] The district court's grant of qualified immunity to the other two governmental defendants, former Deputy Attorney General Eric Holder and former INS Commissioner Doris Meissner, was not at issue in the appeal.

"social costs" entailed by the judicially implied *Bivens* cause of action:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.

Harlow v. *Fitzgerald*, 457 U.S. 800, 814 (1982). When, as in this case, the *Bivens* action is brought against a high-level governmental official, those costs can be "peculiarly disruptive of effective government" and "could implicate separation-of-powers concerns." *Id.* at 817 & n.28. See also *Smith* v. *Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986) (Scalia, J.,). Thus, even assuming *arguendo* that petitioners are correct in suggesting that a heightened pleading requirement is not warranted in routine *Bivens* actions (but see Point 3, *infra*), distinct constitutional considerations might nonetheless justify imposing a more particularized pleading requirement in cases involving high-level government officials. There is no circuit conflict on that discrete and constitutionally sensitive question; indeed, the government is not aware of any court of appeals that has yet addressed it. None of the cases composing the existing circuit conflict involved actions targeting high-level government officials exclusively, if at all. Moreover, petitioners' failure even to cite *Crawford-El* deprived the court below of the opportunity to explain how the distinctive features of the case might affect the necessary content of the allegations.

Petitioners' claim against former Attorney General Reno, moreover, is predicated on demonstrating that she violated their constitutional rights not directly, but in a supervisory capacity. To state such a claim, petitioners' complaint must go beyond alleging the constitutional injury inflicted. The complaint must allege facts establishing that Attorney General Reno herself caused those injuries through her supervisory conduct. See Pet. App. 9-10 (citing cases); see also *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1561 (11th Cir. 1993) (no supervisory liability where plaintiff failed to show that the supervisors "directed the [officers] to act *unlawfully* or that they knew the [officers] would act unlawfully and failed to stop it"), modified on other grounds, 14 F.3d 583 (1994). Again, unlike the more typical *Bivens* action that targets the individuals alleged to be directly responsible for inflicting the constitutional injury, petitioners' claim, by its very nature, requires additional factual pleading to state a claim of causation. That is because "[t]he standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous." *Braddy* v. *Florida Dep't of Labor & Empl. Sec.*, 133 F.3d 797, 802 (11th Cir. 1998). Given that context, the line between the true imposition of a heightened pleading requirement and simply firm enforcement of the requirement that the complaint allege facts showing causation in order to state a claim of supervisory liability would be hard to discern. See Pet. App. 11-12 (finding that complaint fails to allege facts establishing causation). And any effort to do so would entail such a record-bound inquiry as to make the case an awkward vehicle for considering the legal question presented.

3. The decision of the court of appeals is correct and consistent with *Crawford-El*. The Eleventh Circuit's pleading precedents comport with Rule 8(a) of the Federal Rules of Civil Procedure, which requires a complaint to include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Applying more particularized pleading requirements in qualified immunity cases simply factors the policies underlying the qualified immunity doctrine into the analysis of whether a complaint "show[s] that the pleader is entitled to relief." This Court took the same tack in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), when it defined "finality" for purposes of appellate jurisdiction, 28 U.S.C. 1291, to include denials of qualified immunity, 472 U.S. at 526-527, and thus applied the general principles governing finality in light of the specific concerns underlying the qualified immunity doctrine.[5]

This Court's decision in *Crawford-El*, *supra*, reinforces the court of appeals' approach. In *Crawford-El*, the Court held that, when a plaintiff brings a constitutional tort claim that is predicated on unconstitutional motivation, the plaintiff need not adduce "clear and convincing evidence" of the defendant's motive in order to survive a motion for summary judgment. 523 U.S. at 578. *Crawford-El*'s holding is directed solely at the quantum of evidence required to go to trial, not at the sufficiency of the pleadings required to withstand a motion to dismiss. Indeed, *Crawford-El* itself reiterated *Harlow*'s endorsement of "a firm application of the

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[5] In this case, the court's approach also factored into the Rule 8 inquiry the underlying substantive law governing supervisory liability in *Bivens* actions—that is, the necessary allegations of meaningful personal involvement.

Federal Rules of Civil Procedure" and stressed the need for district courts to "protect[] the substance of the qualified immunity defense." *Id.* at 597-598 (internal quotation marks omitted). Among other things, the Court emphasized that "the [district] court may insist that the plaintiff 'put forward *specific, nonconclusory factual allegations*' that establish improper motive * * * in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (emphasis added).

In so holding, the Court cited with approval Justice Kennedy's concurring opinion in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), which emphasized that "avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls." 500 U.S. at 236 (Kennedy, J., concurring in judgment); see also *id.* at 235 ("The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter.").

The pleading standard applied by the Eleventh Circuit, which requires "some factual detail," *Oladeinde* v. *City of Birmingham*, 963 F.2d 1481, 1485 (1992), cert. denied, 507 U.S. 987 (1993), rather than "mere conclusory notice pleading," *Fullman* v. *Graddick*, 739 F.2d 553, 556 (1984), closely mirrors *Crawford-El*'s endorsement of requiring "specific, nonconclusory factual allegations," and it is faithful to the "avoidance of disruptive discovery" that Justice Kennedy's con-

currence in *Siegert*, 500 U.S. at 236, recognized as an integral part of the qualified immunity defense.[6]

Beyond that, as discussed at p. 11 , *supra*, because petitioners' claim for relief turns upon demonstrating that a supervisory official caused the constitutional injuries alleged, the court of appeals' pleading requirement in this case is well grounded in the substantive law of supervisory liability alone, based on the "firm application" of principles of notice pleading directed by this Court in *Harlow*, 457 U.S. at 820 n.35.

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[6] Indeed, most of the courts of appeals that have rejected heightened pleading requirements have *not* done so on the ground advanced by the petition (Pet. 10-13) of alleged inconsistency with *Crawford-El*. Rather, the courts have recognized the appropriateness of imposing heightened pleading requirements under *Crawford-El*, but have concluded that the pleading requirement should be independently imposed by district courts and not dictated by the courts of appeals across the board. See *Goad*, 297 F.3d at 504 ("*Crawford-El* permits *district courts* to require plaintiffs to produce specific, nonconclusory factual allegations of improper motive before discovery.") (emphasis in original); *Trulock*, 275 F.3d at 405 (under *Crawford-El*, the district court "has the discretion to ask a plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive"); *Currier*, 242 F.3d at 916 (the "option" to require "specific, nonconclusory factual allegations" "resides in the discretion of federal trial judges, not federal circuit courts").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 03-841

IN THE

Supreme Court of the United States

DONATO DALRYMPLE, *et al.*,

Petitioners,

v.

JANET RENO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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INTRODUCTION

The decision of the Eleventh Circuit in this case should not be allowed to stand because it would alter Petitioners' cause of action in a way that undermines the very purpose of a *Bivens* action[1] – to provide a remedy for a violation of federal rights – by imposing on Petitioners a heightened pleading requirement more stringent than provided under the Federal Rules of Civil Procedure ("Federal Rules"), in contravention of this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Review of this case is further warranted and necessary to resolve the conflict among the circuit courts of appeal on this important issue.

Respondents do not dispute that a conflict exists among the United States courts of appeals on the important question of law in this case, *i.e.*, whether, consistent with this Court's decision in *Crawford-El*, *supra*, a court may impose a heightened pleading requirement on the plaintiff in a civil rights lawsuit where the defendant is asserting a qualified immunity defense. *See* Resp. Br. in Opp. 6. They contend, nevertheless, that review of this case would be inappropriate for three reasons. First, they argue that Petitioners did not technically present and preserve their right to challenge the court of appeals' imposition of its unconstitutional heightened pleading requirement because Petitioners failed to raise the issue in a timely manner in their briefs below. Second, they argue that the facts of this case are unique or atypical merely because Petitioners brought this action solely against high-level, supervisory government officials who had pre-approved the actions that violated Petitioners' federal rights and not against the lower-

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[1] This action seeks to hold Respondents liable under *Bivens v. Six Unknown Named Narcotics Agents of the Federal Bureau of Narcotics*, 430 U.S. 388 (1971) for their roles in ordering the execution of the predawn raid that forcibly removed six-year-old Elian Gonzalez from the home of his Miami relatives and in ordering the use of excessive force against Petitioners who had gathered peacefully in public spaces and their own yards to converse, pray and express their views when the raid was executed.

level government enforcement agents who carried out those acts. Third, they contend, as a last resort, that the decision below is correct. *See* Resp. Br. in Opp. 8.

Respondents' arguments fail to pass muster. First, Petitioners did not waive their right to challenge the appellate court's imposition of a heightened pleading requirement, because the district court had found that Petitioners had properly pleaded their *Bivens* claims, Respondents never argued below for the imposition of such a "heightened pleading requirement," and the court of appeals blind-sided Petitioners by imposing a heightened pleading standard without requesting the parties to brief whether such a requirement was constitutional in light of the *Crawford-El* decision. In any event, Petitioners raised this issue at the earliest opportunity in their petition for rehearing and, thereby, did not waive this issue.

Second, the unconstitutional, heightened pleading requirement imposed by the court of appeals below is contrary to *Crawford-El*, *supra*, and, therefore, the decision is incorrect and must be reversed.

Third, this case is not an inappropriate vehicle for review merely because it involves a former high-level government official instead of a lower-level government official. Indeed, Respondents' suggestion (Resp. Br. in Opp. 10) that constitutional considerations might justify imposing a heightened pleading requirement in cases involving high-level government officials finds no support in *Crawford-El* or any other decisions of this Court. Finally, the capricious failure by the court of appeals to adhere to *Crawford-El* in reversing the district court below cries out for review in this socially and constitutionally important case.

I. Review Is Warranted Because The Decision Below Improperly Imposes An Unconstitutional, Heightened Pleading Requirement On Petitioners Contrary To This Court's Decision In *Crawford-El*.

In reversing the district court below, the court of appeals erroneously imposed an unconstitutional, heightened pleading requirement on Petitioners. The appellate court's opinion states in pertinent part: "In examining the factual allegations of the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity. *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998)." Pet. App. 10. As the citation to the *GJR Investments* case indicates, the appellate court's "heightened pleading requirements" imposed a more stringent standard than the usual pleading requirements provided under Rule 8(a) of the Federal Rules.[2] The imposition of the heightened pleading requirement in this case is fundamentally at odds with this Court's decision in *Crawford-El*.

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[2] In *GJR Investments, supra*, the U.S. Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") stated: "However, while Fed.R.Civ.P. 8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff allege with some specificity the facts which make out its claim." 132 F.2d at 1367. The court also emphasized: "We stress at this point, as we did in *Oladeinde*, *see* 963 F.2d at 1485, that the heightened pleading requirement is the law of this circuit...Although the Supreme Court has held that courts may not impose a heightened pleading requirement in § 1983 cases involving municipalities, *see Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 507 U.S. 163, 167-68, 113 S. Ct. 1160, 1162, 122 L. Ed. 2d 517 (1993), the Court specifically declined to extend its holding to cases involving individual government officials, *see id.* at 167, 113 S. Ct. at 1162, and we likewise decline to do so here." *Id.* at 1368. After this Court's decision in *Crawford-El*, any prior distinction between the pleading requirements in civil rights actions against a municipality vis-à-vis an individual government official ceased to exist. This Court's decisions in *Leatherman, supra*, and *Crawford-El, supra*, make clear that, in any civil rights action, heightened pleading requirements more stringent than those provided under Fed. R. Civ. P. 8(a) are unconstitutional.

In *Crawford-El*, the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") had fashioned a special rule for constitutional claims based on improper motive by requiring a plaintiff to meet the clear and convincing burden of proof to survive summary judgment. Reversing the appellate court in *Crawford-El*, this Court stated, in pertinent part, as follows:

> Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs at either the summary judgment stage or in the trial itself...The unprecedented change made by the Court of Appeals in this case, however, lacks any common law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983 – to provide a remedy for the violation of federal rights.

Crawford-El, 523 U.S. at 594-95. Although *Crawford-El* held that federal courts may not impose a heightened burden of proof in civil rights actions brought under 42 U.S.C. § 1983, this Court's reasoning was much broader. In *Crawford-El*, this Court stated:

> In the past, we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, or requiring pleadings of heightened specificity in cases alleging municipal liability...our cases demonstrate that questions regarding pleading, discovery and summary judgment are most frequently and most effectively resolved by the rulemaking process or the legislative process.

Id. at 595 (citations omitted). Thus, the reasoning of *Crawford-El* was sufficiently broad to apply directly to the instant case.

The *Crawford-El* decision is in complete harmony with this Court's prior decision in *Leatherman*, *supra*, where this Court, in a civil rights action against a municipality, struck down a heightened pleading requirement similar to the heightened pleading requirement in the instant case. In *Leatherman*, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") had applied a heightened pleading standard, similar to the heightened pleading standard imposed in the instant case, that required the plaintiff to state with factual detail and particularity the basis for the claim, including why the defendant could not maintain the defense of qualified immunity. *Leatherman*, 507 U.S. at 167. The *Leatherman* Court stated: "We think it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168.

The Court reasoned further that Rule 8(a) of the Federal Rules requires only " a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*; *see Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

This Court in *Leatherman* also noted that Rule 9(b) of the Federal Rules permits malice, intent, knowledge and other condition of mind of the defendant to be averred generally, without the special requirement of particularity essential to support a fraud claim. *Leatherman*, 507 U.S. at 168; Fed. R. Civ. P. 9(b).

In the case *sub judice,* the court of appeals held that Petitioners' allegations of a causal connection between Respondent Reno's supervisory actions in approving the specific acts of excessive force that violated Petitioners' rights and the alleged

constitutional violations by the enforcement agents on the scene who carried out those acts did not meet the "heightened pleading requirements" for civil rights cases involving qualified immunity. Pet. App. 13. Applying a pleading requirement more stringent than provided under the Federal Rules, the appellate court found Petitioners' factual allegations were insufficient because they "fail[ed] to allege that the detailed plan for the raid included spraying peaceful protesters, neighbors and passers-by with gas, beating them, detaining them at gunpoint, or threatening to shoot them." *Id.*

The court of appeals reached this incredible result notwithstanding that Petitioners specifically alleged that "[Respondent] Reno ordered the raid... despite **knowing and intending that**: (1) a strike force of 151 heavily-armed federal agents...would be unleashed on the Gonzalez family's home and neighborhood; (2) **peacefully assembled supporters would be sprayed with gas for having assembled and expressed their support for Elian and the Gonzalez family, and to prevent them from continuing to do so; and (3) neighbors, supporters and passers-by would be gassed, restrained, beaten, threatened and put in immediate fear for their lives and liberty**." Pet App. 12-13 (emphasis added). The appellate court's finding is even more untenable because Petitioners also alleged that: "the raid was a carefully-choreographed, pre-planned event, **the details of which [Reno] had fully approved**" and that "Reno admitted that the **only independent authority given to the federal agents on the scene was the precise timing of the raid.**" Pet. App. 13 (emphasis added). Petitioners also alleged that Respondent Reno's improper motive was evidenced by her admission after the raid that: "all objectives for Operation Reunion were met, with no significant injuries to either federal agents or bystanders and no fundamental changes to the approved plan." A fair reading of these allegations is that Respondent Reno knowingly approved a detailed plan that specifically called for and blessed the pre-ordained use of excessive force against Petitioners in violation of their

constitutional rights and that Respondent Reno confirmed after the raid that all the actions taken by the agents on the scene (including those that violated Petitioners' rights) were taken in accordance with the detailed plan she had approved. Contrary to the appellate court's finding, these factual allegations were neither vague nor conclusory as to causal connection or improper motive. While these allegations may not have met the Eleventh Circuit's unconstitutional "heightened pleading requirements," they met the requirements of the Federal Rules and were sufficient under the reasoning of *Crawford-El.* Accordingly, review of this erroneous decision is warranted and necessary.

II. Review Is Warranted Because Petitioners Did Not Waive Their Right To Challenge The Court Of Appeals' Imposition Of An Unconstitutional, Heightened Pleading Requirement.

Respondents contend that Petitioners did not properly present or preserve their argument that the heightened pleading requirement applied by the court of appeals in this case is unconstitutional, because they failed to place in issue the appropriateness of the Eleventh Circuit's continued application of an unconstitutional heightened pleading requirement in civil rights cases. Respondents further assert that Petitioners' omission was a tactical litigation judgment, as Respondents argued below that the Eleventh Circuit's heightened pleading requirement was consistent with *Crawford-El. See* Resp. Br. in Opp. 6-7.

Respondents' argument is disingenuous for two reasons. First, because the district court found that Petitioners properly had pleaded their *Bivens* claims, a "heightened pleading requirement" did not become an issue on appeal until the court of appeals blind-sided Petitioners by imposing a heightened pleading standard *sua*

sponte. Petitioners preserved this issue by raising it at the earliest opportunity in their petition for rehearing *en banc*.[3]

Second, contrary to their assertion, Respondents never contended that the court of appeals should apply a "heightened pleading requirement." *See* Gov't C.A. Opening Br. 22, 32-34; Gov't Reply Br. 9-10. Indeed, Respondents' briefs below never mentioned the words "heightened pleading requirement." *Id.* Respondents never argued that the court of appeals should apply the heightened pleading standard rejected by this Court in *Leatherman*, *supra*, and applied by the court of appeals in *GJR Investments*, *supra*, and in this case.[4] Instead, Respondents merely argued that the court should adopt the standard endorsed by this Court in *Crawford-El*.[5] *Id.* Thus, contrary to their assertion, Respondents never placed in issue the "heightened pleading requirement" applied by the court of appeals here and Petitioners had no reason to anticipate that the court of appeals would not follow the governing law of *Crawford-El*.

III. Review Is Warranted And Necessary To Resolve An Admitted Conflict Among The Circuits On This Important Issue.

Respondents concede, as they must, that a conflict exists among the circuits as to whether, consistent with *Crawford-El*, a

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[3] *United States v. Martinez*, 96 F.3d 473, 475 (11th Cir. 1996), *cert. denied*, 519 U.S. 1133 (1997), cited by Respondents, is inapposite because that case involves a failure to raise an error committed by the district court, not an error committed by the appellate court. *See* Resp. Br. In Opp. 7, n. 2.

[4] Although Respondents cited dicta from *GJR Investments*, *supra*, in their briefs, they did not argue that the court of appeals should apply in this case the same heightened pleading standard applied in *GJR Investments*.

[5] Respondents asserted that the court of appeals should require Petitioners to plead their claim of supervisory liability and improper motive with specific, non-conclusory factual allegations – a standard blessed by this Court in *Crawford-El*. *See* Gov't C.A. Opening Br. 21-22, 33-34; Gov't Reply Br. 9-10.

court may apply a heightened pleading standard more stringent than the Federal Rules in a civil rights lawsuit where the defendant is asserting a qualified immunity defense. *See* Resp. Br. in Opp. 8. This conflict is discussed at some length by Chief Judge Edwards in his concurring opinion in *Crawford-El v. Britton*, 93 F.3d 813, 851-52 (D.C. Cir. 1996) (Edwards, C.J., concurring in judgment) and by the Court of Appeals for the Tenth Circuit in *Currier v. Doran*, 242 F.3d 905, 913-15 (10th Cir. 2001). Given the existence of this circuit conflict, it is appropriate for this Court to resolve it with finality in this case.

Respondents further argue that this case is an inappropriate vehicle because the Eleventh Circuit has not yet determined the effect of *Crawford-El* on its heightened pleading requirement. This argument, however, incorrectly assumes that there is room for debate as to whether a heightened pleading requirement is permitted under *Crawford-El*. There is no exception under the *Crawford-El* reasoning for the imposition here of any pleading requirement more stringent than that provided under the Federal Rules. Furthermore, on review of this case, this Court may remand it back to the Eleventh Circuit for resolution of the constitutionality of its heightened pleading requirement in light of *Crawford-El*.

Finally, Respondents' suggestion that special considerations may justify a heightened pleading requirement in civil rights cases brought against high-level government officials is an unsupported invitation to undercut the broad application of *Crawford-El* and foster further conflict among the circuits on this important issue. Unless and until this circuit conflict is resolved, plaintiffs in civil rights actions will be held to differing pleading standards depending upon the circuit in which they file their actions. Allowing this circuit conflict to persist will foster unfairness in the circuits, such as the Eleventh Circuit, that impose a more stringent pleading standard than under the Federal Rules. Furthermore, if this Court refuses to enforce the rule of *Crawford-El* in this case, such refusal inevitably will lead to the gradual erosion of

Crawford-El and will create confusion among the circuits as to the meaning and scope of *Crawford-El*, thereby producing uncertainty as to the applicable pleading standard in civil rights cases.

CONCLUSION

This Court should grant the petition and reverse the court of appeals' decision below and thereby resolve the conflict among the circuits by clarifying that a court may not impose on a plaintiff in a civil rights action a heightened pleading requirement more stringent than provided under the Federal Rules.

Respectfully submitted,

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